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Attorneys for Plaintiff
FIREMAN'S FUND INSURANCE COMPANY,
a foreign corporation a/s/o BASIC RESOURCES, INC.
and GEORGE REED, INC., a foreign corporation

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

FIREMAN'S FUND INSURANCE
COMPANY, a foreign corporation
a/s/o BASIC RESOURCES, INC.
and GEORGE REED, INC., a foreign
corporation,

Plaintiff,

vs.

GERLING AMERICA INSURANCE
COMPANY, a foreign corporation,

Defendant.

CASE NO. C 07 06302 CRB

**NOTICE OF MOTION: PLAINTIFF'S
MOTION FOR FINAL SUMMARY
JUDGMENT (D.E. 58) PREVIOUSLY
NOTICED IN WRITING ON THE MOTION
CALENDAR OF THE PRESIDING JUDGE
AND SET FOR HEARING BY ORDER OF
THE COURT (D.E. 30) [F.R.C.P. 56]**

**Hearing Date: August 8, 2008
Time: 10:00 a.m.
Courtroom: 8**

TO: THE HONORABLE COURT AND TO DEFENDANT AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT, as Ordered (D.E. 30) August 8, 2008 at 10:00 a.m. or as soon thereafter the matter may be heard in Courtroom 8 before the Honorable Charles R. Breyer at the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California 94012, Plaintiff FIREMAN'S FUND INSURANCE COMPANY a/s/o BASIC RESOURCES, INC. and

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1 GEORGE REED, INC. ("FFIC") will move this Court for an Order granting its Motion for Final
2 Summary Judgment and enter Final Summary Judgment in favor of FFIC and against Defendant,
3 GERLING AMERICA INSURANCE COMPANY ("GERLING") in accordance with the full
4 "Relief Sought" (D.E. 58).

5
6 FFIC makes this Motion pursuant to Federal Rule of Civil Procedure 56, Civil L.R. 7-1
7 through 7.5, inclusive, as well as the legal authorities cited in the Motion (D.E. 58). In support of
8 this Motion, FFIC has filed true copies of the GENCOR contract, trial transcripts and other relevant
9 court records from the Underlying State Court Action, See: D.E. 36-1, with Exhibits; 49-2, with
10 Exhibits; 56-2 with Exhibits; and 29-1, 29-2, 29-3 ("Tr. Tr."). FFIC also relies upon matters already
11 of record as offered in support of FFIC's Response and Cross Motion for Judgment on the
12 Pleadings and for all other Purposes and certain discovery responses filed herein. D.E. 36, 36-1; 36-
13 2. GERLING admits: (1) that the Policy attached as Exhibit 1 to the Fourth Amended Complaint is
14 a true and correct copy of the Policy in effect at the time of the explosion which gave rise to the
15 Underlying State Court Action D.E. 31; (2) that GERLING insured the underlying Defendant,
16 GENCOR INDUSTRIES, INC. ("GENCOR") pursuant to the policy; (3) that GERLING defended
17 GENCOR pursuant to that policy but with "an express reservation of rights; (4) that a jury returned
18 a verdict in favor of FFIC determining that GENCOR breached its contract with BASIC
19 RESOURCES and GEORGE REED (FFIC Insureds); and (5) that GENCOR was 60% negligent
20 and BASIC RESOURCES and GEORGE REED were 40% negligent for the explosion." D.E. 31, ¶
21 4-12. Judgments have been entered in favor of FFIC against GENCOR for \$1,751,913.10
22 (comprising \$959,787.00 for physical damage to property, \$64,322.00 for lost profits and
23 \$169,716.00 for additional expense along with \$558,088.15 for pre-judgment interest) and
24 \$42,000.00 for costs. D.E. 29; 29-2; 29-3. FFIC has demanded payment for all of the foregoing
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26
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28

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1 sums "covered" under GERLING's policy in addition to post Judgment interest at 11% per year as
2 provided in F.S. § 55.03 (D.E. 29).

3 The Court has previously determined that GENCOR is "legally obligated" to pay the
4 damages awarded to FFIC notwithstanding that the Final Judgments are "non personam" (D.E. 29-
5 2, 29-3). FFIC has legal standing to bring this insurance coverage dispute in its capacity as a
6 Judgment Creditor of GERLING's insured and an intended third party beneficiary to insurance
7 benefits for property damages and supplementary payments pursuant to and in accordance with the
8 terms of the subject GERLING policy, coverage for which is provided thereunder and for which no
9 exclusion applies.

10
11 DATED: 8th DAY OF July 2008.

12
13 By: /s/ Jon D. Derrevere
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Co-counsel for Plaintiff

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PROOF OF SERVICE

Fireman's Fund Ins. Co. v. Gerling American Ins.

United States District Court, Northern District of California

Case No.: C 07 06302 CRB

I am employed in the City and County of West Palm Beach, State of Florida. I am over the age of 18 and not a party to the within action; my business address is: Derrevere, Hawkes & Black, 470 Columbia Drive, Building "B", West Palm Beach, Florida 33409.

On July 8th, 2008, I served the foregoing document(s) described as:

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On the interested parties in this action by placing ☐ the original ☒ a true copy thereof enclosed in a sealed enveloped addressed as stated below:

☐ BY REGULAR MAIL:

I caused such envelopes to be deposited in the United States Mail at West Palm Beach, Florida with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with United States postal service each day and that practice was followed in the ordinary course of business for the service herein attested to.

☒ BY ECF:

I HEREBY CERTIFY that on this 8th day of July, 2008, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on: TINO X. DO, Barger & Wolen, LLP, 650 California Street, 9th Floor, San Francisco, CA 94108, tdo@barwol.com and CHARLES K. BRUNN, Brunn & Flynn, 928 12th Street, Suite 200, P.O. Box 3366, Modesto, CA 95354, CBrunn@Brunn-Flynn.com via transmission of Notices of Electronic Filing generated by CM/ECF.

☒ FEDERAL - I declare that I am employed in the office of a member of the Florida Bar, admitted to practice in all Florida Courts and who makes this Pro Hac Vice Application, that our co-counsel and sponsor is a member of the bar of this California Court, and at their direction this service was made. Executed at West Palm Beach, Florida on July 8th, 2008.

NAME: *Deanna N. Menendez*

Signature:

Deanna N. Menendez

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